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THE EMPLOYEE SHAREHOLDER

The Unbearable Lightness of Being ... an Employee in Britain

PIERRE DE GIOIA-CARABELLESE*

ABSTRACT

The aim of this paper is to discuss and analyse the impact of the new category of the employee shareholder within the context of the traditional theory of the contract of service and contract for services. A commentary on the provisions of the Growth and Infrastructure Act 2013 which heralded the introduction of the employee shareholder category will be provided in addition to a focus on the implied duties traditionally applied to personal employment contracts. One of the themes of the analysis is to assess whether and how these duties will apply to the future hybrid (and obscure) statutory construct of the 'employee shareholder'. To provide a comparative analysis, this contribution will also briefly examine whether any potential counterpart of the new British concept exists in Italian law. Finally, the paper will discuss possible flaws in the British legislation concerning employee shareholders, by taking an approach that is disarticulated from the traditional theory of employment law. One such issue concerns the systematic offer of shares and acceptance of the loss of employee status, which may render the EU law requirements of publication of a prospectus and communication of a redundancy plan to the trade unions redundant.

Keywords: Britain; comparison; employee shareholder; EU legislation; new rules

§1. INTRODUCTION

In modern times, the contract of service is the contractual framework 'governing' the interaction between master and servant, as opposed to the less formal contract for services existing between a worker and an employing entity. From a historical perspective, this

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dichotomy is not an *aliquid novi*, for it is the legacy of its Roman law ‘ancestor’ and the concept of *locatio operis*, the latter being the conceptual antonym of the *locatio operarum*.¹ In British common law, the contract of service has been cultivated as a distinct category by the judiciary, through the elaboration of tests. These aim to better define, on the one hand, its salient features within the economic reality of the work environment,^{2, 3} and on the other hand the divergences of the ‘dependent’ (or ‘subordinate’) from its correspondent ‘independent’ or ‘autonomous’ (the mere worker).⁴ Additionally and despite recent doctrinal elucidations and reflections,⁵ the authorities have consistently stressed the theory of the existence of ‘an irreducible core of obligations in the contract of employment’.⁶ Therefore, duties owed by the employee to the employer as a result of the characterization of a genus of contract as a ‘contract of service’ have been imposed by the common law, which in contrast, do not apply to other personal work relationships.

Furthermore, employment protection legislation has ‘sprouted’ around this concept, particularly in the previous five decades. With the epistemological background of what is, particularly in the civil law jurisprudence, the eternal contrast between *ius cogens* and *ius dispositivum*,⁷ such statutory protection has introduced a heterogeneous series of irrevocable norms. These provide the employee – one of the two parties to the contract of service – with a particular protected status to which a distinct set of privileges and prerogatives are attached.⁸ Among these rights, the most significant, also because it is a principle widely recognized at international level,⁹ is undoubtedly the right not to be

¹ P. du Plessis, *Borlowski’s Textbook on Roman Law* (4th edition, Oxford University Press, 2010), p. 277–279.

² It is well known that the judicial paradigm of this test is *Market Investigations Ltd v. Minister of Social Security* [1969] 2 QB 173. See also judicially, as to the pure ‘control’ test, *Yewens v. Noakes* (1880) 6 QBD 530, 532, 533. As far as agency workers are concerned and before the enactment of the Agency Workers Regulations 2010, see specifically *James v. Greenwich London Borough Council* [2008] IRLR 302.

³ M. Freedland and N. Kountouris, *The Legal Construction of Personal Work Relations* (Oxford University Press, 2011), p. 185. Namely, it is affirmed: ‘English law of contracts of employment has tended to be perceived as more specialized and distinctive as time has gone’.

⁴ D. Cabrelli, *Employment law in Context* (Oxford University Press, 2014), p. 59–132; S. Deakin and G.S. Morris, *Labour Law* (6th edition, Hart Publishing, 2012), p. 155–171.

⁵ D. Brodie, ‘Fair Dealing and World of Work’, 1 *ILJ* (2014), p. 30–31. In this recent seminal contribution, it is argued that, ultimately, contracts of employment and those for services ‘have much in common, more in fact than they have apart’ and that ‘the traditional thinking [contract of service as opposed to contract for services] seems increasingly outdated as the common law is evolving to a position whereby contract for the provision of work are underpinned by shared rather than divergent values’.

⁶ S. Deakin and G.S. Morris, *Labour Law*, p. 265.

⁷ Therefore the imperative norms encompassed by the legislation and the ‘optional’ ones created by the courts. See O. Kahn-Freund, ‘A Note on Status and Contract in British Labour Law’, 80 *MLR* (1967), p. 641.

⁸ *Ibid.*, p. 636.

⁹ See A. Perulli, ‘Fundamental Social Rights, Market Regulation and EU External Action’, 1 *International Journal of Comparative Labour Law and Industrial Relations* (2014), p. 27–48; and ILO Recommendation No. 119 of 1963 on the termination of employment. See A.C.L. Davies, *Perspective on Labour Law* (2nd edition, Cambridge University Press, 2009), p. 157–175.

unfairly dismissed.¹⁰ However, at a more domestic level, the right to receive a redundancy payment upon the occurrence of the relevant conditions set forth under statute is also significant.¹¹

§2. THE NOVELTY OF THE EMPLOYEE SHAREHOLDER

Yet, despite this consolidated trend, it now seems that the pillar of the contractual relationship at work is a 'fortress under siege'. A recent piece of legislation in Britain, the Growth and Infrastructure Act 2013 (GIA 2013), to which Royal Assent was given on 25 April 2013 and which entered into force on 1 September 2013, 'baptises' and celebrates a new category, the 'employee shareholder'. Apart from the technicalities of the new statute,¹² prompted by the British coalition government within their 'austerity programme',¹³ Section 31(1) of the GIA 2013 seems to create from scratch an additional personal work contract or relationship (or a mere commercial one?!). The employee shareholder is an individual who receives fully paid up shares of the organization he

¹⁰ In the ultimate legislative framework of the Employment Rights Act 1996 (ERA 1996), particularly section 94.

¹¹ Also in this case, Employment Rights Act 1996, particularly section 135.

Additional rights that the employee shareholder renounces, are, on the one hand, the request to undertake study or training (section 63D of the ERA 1996), and on the other hand, the request for flexible working (section 80F of the ERA 1996).

Conversely, the rights that the employee shareholder is still entitled to exercise, would be the following ones:

1. Statutory sick pay;
2. Statutory maternity, paternity and adoption leave and pay;
3. Unfair dismissal rights where they are classed as automatically unfair reasons;
4. Minimum notice periods if their employment will be ending;
5. Time off for emergencies;
6. Collective redundancy consultation;
7. TUPE;
8. National Minimum Wage;
9. Not to have unlawful deduction from wages;
10. Paid annual leave;
11. Rest breaks;
12. The right not to be treated less favourably for working part time or fixed term;
13. Not to be discriminated against.

See Department for Business, Innovation & Skills, 'Guidance Employee Shareholders', *Website of the UK Government* (2014), <https://www.gov.uk/employee-shareholders>.

¹² The Growth and Infrastructure Act 2013 is an extensive statute assembling multifarious law provisions ranging from the 'use of infrastructure' to the 'the carrying-out of development and the compulsory acquisition of land' as well as 'rating lists (...) to be compiled'. Last in the order but not the least important for the purposes of this research, the ultimate statute in discussion comes up with provisions 'about the rights of employees of companies who agree to be employee shareholders'.

¹³ HM Government, 'Coalition: our Plan for Government', Cabinet Office (2010), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf.

belongs to, or its parent undertaking (in both cases, exclusively a company limited by shares), for an amount of no less than £ 2,000. This amount is exempt from capital gains tax up to a limit of £ 50,000. In return, the employee renounces significant rights, particularly, but not exclusively, the fundamental right bestowed upon employees, the right not to be unfairly dismissed.

The individual, 'who is or becomes an employee of a company' acquires the status of 'employee shareholder' through a simple agreement (section 205A(1)(a) of the amended Employee Rights Act 1996 (ERA 1996)). The outcome of this agreement is the issue or allotment to the consenting employee of 'fully paid up shares in the company' (whether these financial instruments have attached voting rights is not a mandatory prescription), as long as the shares 'have a value on the day of issue or allotment of no less than £ 2,000' (section 205(1)(b) of the ERA 1996). A corollary of this *datio* of shares is the consignment to the individual of a 'written statement of the particulars of the status of employee shareholder' (following section 205A(1)(c) of the ERA 1996). The agreement therefore shall not be legally enforceable until the employee has received a written list of particulars following advice with regard to the contract of which the company will bear 'reasonable' cost.¹⁴ More specifically, according to section 31(6) of the GIA 2013:

Agreement between a company and an individual that the individual is to become an employee shareholder is of no effect unless, before the agreement is made –

- (a) the individual, having been given the statement referred to in subsection (1)(c), receives advice from a relevant independent adviser as to the terms and effect of the proposed agreement,
and
- (b) seven days have passed since the day on which the individual receives the advice.

Arguably, it is not specified in the GIA 2013 whether this advice shall be qualified (for example given by a lawyer or a trade union). The tenor of the legislation and the adjective 'independent' seem to suggest that, the advice, as long as it is given by an entity and/or person separate or unrelated to the employer, shall be regarded as valid. However, the British government has made an attempt to clarify the otherwise misleading terminology and suggested that (exclusively) a qualified lawyer, certified trade union official, advice centre worker or any other person authorized to give legal advice by the Secretary of State may fit into the category of eligible advisor for purposes of the GIA 2013.¹⁵

The following section 205A(7) of the ERA 1996 highlights the costs of this advice: 'Any reasonable costs incurred by the individual in obtaining the advice (whether or not

¹⁴ Section 31(7) of the GIA 2013.

¹⁵ The only exclusion relates to in-house lawyers or lawyers who acted for the company. See Department for Business, Innovation & Skills, 'Guidance Employee Shareholders', *Website of the UK Government* (2014), <https://www.gov.uk/employee-shareholders>.

the individual becomes an employee shareholder) which would, but for this subsection, have to be met by the individual are instead to be met by the company’.

The consignment of the shares shall be gratuitous according to law as the ‘individual gives no consideration other than by entering into the agreement’ (section 205A(1)(d) of the ERA).

§3. THE EMPLOYEE SHAREHOLDER AND THE COMMON LAW IMPLICATIONS

Beyond the ‘black letter’ of the new legislation, the employee shareholder categorization engenders a number of more wide-ranging and philosophical considerations. There is limited existing academic literature on the employer shareholder category,¹⁶ but some legal considerations are brought to light by an initial cogitation on the new typology at stake.

A. THE BLEND OF EMPLOYEE AND SHAREHOLDER

First and foremost, the composite terminology shaped by the United Kingdom legislature (by merging employee and shareholder) would seem to be an ‘awkward’ alignment of two otherwise contradictory characters – on the one hand the employee¹⁷ and, on the other hand, the shareholder.¹⁸ The former represents the traditional ‘dependent’, whose contract of service firmly ties him to his employer who, in turn, is bestowed with the ‘power of direction and control’.¹⁹ The shareholder is merely a member of a company owning a holding in its share capital. The merging of the two, then, results in an unnaturally and artificially unified oxymoron. From an ontological point of view, it is interesting therefore to dwell on the implications of this ‘forced marriage’ between employment law and company law, and how the ‘offspring’ of this uncomfortable relationship – the employee shareholder – will come to be regarded in the universe of the ‘world of work’.

¹⁶ The only contributions to date are those of a scholar: J. Prassl, ‘Employee Shareholder “Status”: Dismantling the Contract of Employment’, 4 *ILJ* (2013), p. 307. As far as the general theory of the stock-ownership plans is concerned, tangentially and within the broader discussion of a textbook, see also G. Pitt, *Employment Law* (9th edition, Sweet & Maxwell, 2014), p. 103–104. It is passionately affirmed that it seems ‘extraordinarily crass to implement a measure [the employee shareholder] allowing employment protection rights to be bought out in this way, and entirely contrary to the whole thrust of protective legislation in the past which has always contained strong anti-avoidance measures’. Additionally, it is highlighted that the ‘price [swap] is insultingly low (and the share value will, of course, fluctuate and could go down substantially) and the employee shareholders may find themselves a disadvantaged class compared with other shareholders’.

¹⁷ On the philosophical category of the dependent, see S. Deakin and G.S. Morris, *Labour Law*, p. 145–171.

¹⁸ On the ontology of the shareholders as ‘members’, see P. Davies, *Clarendon Law Series Introduction to Company Law* (2nd edition, Oxford University Press, 2010).

¹⁹ S. Deakin and G.S. Morris, *Labour Law*, p. 145.

As a preliminary foray into the mechanics of the relationship, a hypothesis can be put forward that the new category is a hybrid merely in its *nomen juris* and the way its astute law-maker semantically has encapsulated the dependent in the relevant classification (the ‘employee shareholder’). However, beyond the facade of this enticing, but at the same time ineffable definition, a consideration of the multitude of rights that the employee must surrender in adhering to the proposal of his employer²⁰ would suggest a radical metamorphosis of the individual is underway. In other words it would appear that the privileged position of employee is under threat to what might be, de facto and despite the linguistic camouflage,²¹ the less auspicious rank of ‘member’.²² The hypothesis is that the GIA 2013, with its creation of this new category,²³ is attempting to covertly extract the employee from the employment law *Weltanschauung* and to transmute him, by adopting a decidedly dubious legislative technique, into the sphere of commercial law.²⁴

²⁰ Section 205A(2) of the amended Employment Rights Act 1996, as detailed by J. Prassl, 4 *ILJ* (2013), p. 313.

²¹ Nonetheless, the new section 205A(3) ERA 1996 does not deprive the new category of some rights usually conferred on employees, such as maternity, parental or adoption leave, though in the new version they are subject to a longer period (see also previous footnote 11). Are these remaining rights still enough to allow the characterization of the employee shareholder as employee or worker? Instinctively, the status-specific elements of statutory protection that remain in place inform the nature of the employee shareholder category, which in turn assists the interpreter in identifying the common law implied duties that shall apply or not apply to that new category. For an analysis of the state-of-the-art of the family friendly policies in Britain, see S. Honeyball, *Honeyball & Bowers' Textbook on Employment Law* (12th edition, Oxford University Press, 2012), p. 298–305; G. Pitt, *Employment Law* (8th edition, Sweet & Maxwell, 2011), p. 175–206; and, more recently, G. Pitt, *Employment Law* (9th edition Oxford University Press, 2014), p. 189–222. As regards the EU dimension, see C. Barnard, *EU Employment Law* (4th edition, Oxford University Press, 2012), p. 401–453.

²² In this respect, if this hypothesis was corroborated, the most recent view – i.e. the employee shareholder regarded as ‘worker’ (J. Prassl, 4 *ILJ* (2013), p. 329) – would result in not being totally convincing. This scholar authoritatively affirms that employee shareholders ‘are left with nothing more than the basic protection available to all workers’. However, the departure from both the genus ‘contract of service’ and the ‘contract for services’ could be inferred not simply from the substance of the relationship (the employee shareholder as a mere member of the company) but also from the legislative technique utilized by the British law maker. To elaborate this second point, the new provisions are not inserted within the *sedes materiae* dedicated to the worker (section 230 of the ERA 1996), rather within the different context of section 205 ERA 1996 under the heading ‘Contracting out etc. and Remedies’.

²³ From a company law perspective and partly beyond the scope of the research, questions would arise as to whether the GIA 2013 has created – in an eccentric way – a new type of shareholder, generated outside the British company law framework. As regards the types of shares under the current Companies Act 2006, see D. French, S. Mayson and C. Ryan, *Mayson, French & Ryan on Company Law* (29th edition, Oxford University Press, 2012), p. 170–171.

Additionally, the way fully paid up shares shall be issued to the benefit of the employee shareholder and the several legal concerns originating therefrom have already been highlighted among scholars. J. Prassl, 4 *ILJ* (2013), p. 319–320.

²⁴ In other jurisdictions, such as the Italian, a specific category of employee shareholder has been codified for decades in the Italian Civil Code (ICC) within the chapter dedicated to the companies limited by shares and categories of shareholders (Article 2349). See below Section 5.

B. THE EMPLOYEE SHAREHOLDER AND THE IMPACT ON HIS COMMON LAW DUTIES

Additionally, the new category of 'employee shareholder' gives rise to a number of, as of yet, unanswered, but terribly intriguing, questions concerning whether or not the implied terms of the personal work or employment contracts and the 'guiding principles' underpinning them²⁵ are applicable to this new concept. To elaborate, if the employee shareholder surrenders his status as party to a contract of service²⁶ it is not immediately obvious, partly due to the ambiguous nature of the new legislation, how the common law will 'react' in response to the traditional categories of duties implied in broader work contracts.²⁷ Instinctively it would not seem overly speculative to anticipate that as the employee shareholder is no longer dependent, the case law shall henceforth oversee a micro-system of implied duties. In doing so, the adjudicators will seemingly rely on either the general theory of commercial contracts²⁸ as opposed to the employment contract, or on both forms of contracts. A reference to both contracts may be justified both by the fact that the employee shareholder liaison is semantically endowed with a 'mixed flavour' (both the personal work and the mercantile risk) and the recently emphasized trend of an increasing convergence of the laws of commercial and employment contracts.²⁹ Nevertheless, if the common law corroborated the hypothesis that the employee shareholder, in his real legal characterization, is a pure shareholder³⁰ and his status ontologically belongs more readily to the law of merchants rather than the discipline of master and servant, intriguingly the myriad duties which would apply to him would be more coherently extracted from the common law of commercial contracts.³¹

²⁵ M. Freedland, *The Personal Employment Contract* (Oxford Monograph on Labour Law, 2006), p. 113–195.

²⁶ J. Prassl, 4 *ILJ* (2013), p. 329. It is affirmed with clarity: 'The new category thus erodes nearly all status-specific elements of protection attached to the core employment relationship: in denying the traditional trade-off between control and protection it represents a complete departure from existing approaches to the determination of employee status'.

²⁷ At the institutional level, for a summary of these duties, see: D. Cabrelli, *Employment law in Context*, p. 137–212; H. Collins, K.D. Ewing and A. McColgan, *Labour Law* (Cambridge University Press, 2012), p. 131–157.

²⁸ As regards the duties owed by the agent to the principal, see L.S. Sealy and R.J.A. Hooley, *Commercial Law Text, Cases and Materials* (4th edition, Oxford University Press, 2009), p. 202–231; for the corresponding Scottish discipline, see F. Davidson and L.J. MacGregor, *Commercial Law in Scotland* (2nd edition, Thomson/W. Green, 2008), p. 68–72.

²⁹ D. Brodie, 1 *ILJ* (2014), p. 51.

³⁰ Or, at least, not an employee.

³¹ This potential issue of friction between common law duties implied to a contract of service and the new category of employee shareholder has already been raised by scholars, in respect of, on the one hand, duty of care in the way the employee is dismissed and, on the other hand, the statutory unfair dismissal. See J. Prassl, 4 *ILJ* (2013), p. 317–318.

C. POSSIBLE DEVELOPMENTS IN COMMON LAW

Although it might be quite pretentious to predict the future case law, within the context of this article it is nonetheless possible to gauge with a certain degree of approximation the prospective doctrinal developments in the area of the duties entailed to the employee shareholder relationship.

In the common laws of Britain, jurists have long been fostering an epistemological approach to the implied terms in fact, mainly based on the combination of the two tests of the ‘business efficacy’ and the ‘officious bystander’.³² In brief, implied terms of the contract are those which are ‘necessary in the business sense to give efficacy to the contract’,³³ but also those which are so obvious that, if an officious bystander would suggest it to the contracting parties, the latter would have the terms included in the contract without hesitation.³⁴

On such a footing, the actual outcome of the doctrinal exegesis could be two-fold: (i) amongst the various implied duties connected with the contract of service, there are several that will no longer apply to the employee shareholder as they are conceptually inconsistent with this new category; (ii) for the remaining duties still applicable to the *genus*, it is essential to assess how they will be construed in future in respect to an individual who has acquired the status of employee shareholder.

As far as the first interpretation is concerned, the employee shareholder, distinct from the employee shall, in all likelihood, not be bound by the obligation of fidelity.³⁵ The basis for this conclusion would appear to rest on conceptual and logical grounds: the employee shareholder does play, as a result of the metamorphosis of his contract of service, a role which is partly mercantile. He is, to a certain degree, a businessman and like any entrepreneur, shall be immune to ties of exclusivity with any employer, including the employing entity with which, initially, a contract of service subsisted. This outcome, philosophically incontrovertible, would appear to withstand the common law angle of observation: the duty of fidelity is historically imposed on employees who, due to their rank in the employer’s organization, are categorized as fiduciaries.³⁶ Conversely, the GIA 2013 – which does not expressly take a position on the rank required for an employee to become an employee shareholder³⁷ – seems to be disarticulated from any role of fiduciary of the employee shareholder.

³² Doctrinally (D. Cabrelli, *Employment Law in Context*, p. 156), it is emphasized that an implied term in fact ‘is not of universal application to contracts of a particular class or type, but specific to the contract at hand between the relevant contracting parties. (...) The justification for inserting implied terms in fact into the contract for the parties is that they reflect the presumed intention of the parties or are identifiable for reference to customs of the trade or the workplace’.

³³ *The Moorcock* (1889) LR PD 64; *Reigate v. Union Manufacturing Co. Ltd* [1918] 1 KB 892.

³⁴ *Shirlaw v. Southern Foundries* (1926) Ltd [1939] 2 KB 206.

³⁵ See, among the different British *dicta*, *Sinclair v. Neighbour* [1967] 2 QB 279.

³⁶ At judicial level, the paradigm of this is *Nottingham University v. Fishel* [2000] IRLR 471. Doctrinally, see S. Deakin and G.S. Morris, *Labour Law*, p. 372.

³⁷ Although there is a lack of literature on this point, it may be affirmed that the new figure is theoretically extended to the entire workforce.

The duty of obedience may be a further ‘casualty’: the employee shareholder’s sacrosanct obligation to comply with the lawful instructions of the employer³⁸ is a natural element of the contract of employment and ‘was accompanied by the master’s right to discipline and perhaps chastise the erring servant’.³⁹ In assessing the work relationship between employee shareholder and employer where the employee is not entitled to claim unfair dismissal, this duty would seem to be inconsistent, or at least dubious in its *ratio essendi*. Furthermore, the reciprocal duty of care⁴⁰ may constitute an additional ‘litmus test’ of this form of epistemological procedure: the solution of the predicament (that is, whether or not the duty applies to the employee shareholder relationship with an employer) would seem to be acutely significant and strategic, particularly in regard to its impact on specific concepts such as vicarious liability. If there was a corroboration of the hypothesis that the employee shareholder is nominally an employee, but de facto a worker, any vicarious liability on the part of the employer for his conduct would certainly be ruled out.

The second possible methodology is more concerned with probing, for each duty, the level of performance expected of the employee shareholder in comparison with that expected of the pure employee. Instinctively, this threshold of performance, for an employee shareholder, would not be set as high and demanding as the one set for an employee. In following this line of reasoning, the potential for the employee shareholder to be held in breach of his contract will be statistically dwarfed by that theoretically conceivable for an employee: the parameters of assessment of the duties of an employee are conceived in a work environment where the individual constitutes an integral part of the employer’s organization, whereas the employee shareholder would appear to be a hybrid figure who, as a result of the conversion of his contract, has undertaken a mix of personal work and business risk.

Ultimately, given the significant degree of uncertainty left by the United Kingdom legislator in this area, a jurist will feel fully entitled to raise a concern about the way in which the duties of the employee shareholder have been drafted (or rather, have not been drafted) in the relevant piece of legislation. Clearly, the statute has defined, in respect to the employee shareholder, the rights which he will relinquish and those that, conversely, he will retain, as a result of accepting the employer’s offer. However, the legislator has not touched on the list of obligations this new category of worker will be obligated to discharge. In all likelihood, given the ground-breaking (and flawed, according to the sceptical ones) nature of the construct,⁴¹ a ‘civil law’ weapon could have been brandished in Britain – namely, an elaboration under legislation of the ambit of obligations and

³⁸ *Laws v. London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698.

³⁹ I. Smith and A. Baker, *Smith & Wood’s employment Law* (11th edition, OUP 2013), p. 163.

⁴⁰ At common law, see *Harmer v. Cornelius* (1858) 5 CBNS 236 or, more recently, *Cheltenham BC v. Laird* [2009] IRLR 621.

⁴¹ The legal concept of employee shareholder is disarticulated from the conventional common law experience and the traditional ‘chasm’ between the contract of service and the contract for services.

duties by which the employee shareholder is bound. An elucidation of the duties would not have constituted a blasphemous transplant of legal concepts belonging to various legal traditions; rather, it would constitute the mere alignment of a missing feature of the new legislation (the duties of the new legislative category) to the new *corpus legis* (that is, the GIA 2013).⁴² If this has not culpably transpired, it is in all likelihood once again due to that entrenched ‘pachydermatous cornucopia of self-esteem that is the life style of the English common law’.⁴³

§4. THE NEW CATEGORY AND ‘LEGISLATIVE PUZZLES’

In terms of an exegesis of the legal provisions at stake, due to the magnitude of the issues emerging from the new category, it would be safe to assume that amendments to the GIA 2013 – correctly defined an unfortunate statute⁴⁴ – will quickly materialize.

A. EMPLOYEE SHAREHOLDER AND PROSPECTUS

Based on legislation recently introduced in Britain the employer is free to offer the proposal of ‘conversion’ of the contract of service to a significant number of his employees. In actual terms, this would be tantamount to a public offer of securities (the shares) to a body of investors.

Indeed, EU legislation has already set forth principles requiring the issuer (and/or, cumulatively, the offeror) to inform the offerees of the characteristics of both the securities offered and the issuer itself. This requirement is manifested upon the approval and publication of a document (the prospectus),⁴⁵ the purpose of which is to safeguard the investor.⁴⁶ Although it would be too speculative to define the employer as a pure financier offering securities, it would be fair to suggest that the ‘employee-shareholder’ category recently created by British legislation was deserving of a better and more holistic approach, in terms of protection of the weak party. To elaborate, in the recently conceived

⁴² About the concept of transplant in the comparative law analysis, see J.H. Merryman, *The Loneliness of the Comparative Lawyer* (Kluwer Law International, 1999), p. 17–49.

⁴³ Lord Wedderburn, ‘Inderogability, Collective Agreements, and Community Law’, 4 *ILJ* (1992), p. 250. The expression, not connected with the topic in discussion, is nonetheless imaginary and persuasive.

⁴⁴ A ‘flawed legislation’, to use the most explicit definition of one of the first scholars who authoritatively commented on it; J. Prassl, 4 *ILJ* (2013), p. 307–337, particularly p. 337.

⁴⁵ Reference is made to Directive 2003/71/EC (Prospectus Directive), concerned with the ‘prospectus to be published when securities are offered to the public or admitted to trading’, Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, [2003] OJ L345/64.

⁴⁶ See Recital 16 of Directive 2003/71/EC which is self-explanatory. It is also added in Recital 19: ‘Investment in securities, like any other form of investment, involves risk. Safeguards for the protection of the interests of actual and potential investors are required in all Member States in order to enable them to make an informed assessment of such risks and thus to take investment in full knowledge of the facts’.

employee shareholder category, the employee would appear to be the beneficiary of a proposal to receive shares (like any investor) and to become *de facto* an entrepreneur. Undeniably, according to the GIA 2013, the company offering the 'employee shareholder status' shall provide the individual with 'a written statement of the particulars of the status of employee shareholder and of the rights which attach to the shares' offered (section 205A of the ERA 1996, as modified by the GIA 2013).⁴⁷ However, what the 'particulars' at stake fail to mention is an appropriate description of both the business and financial accounts of the employer offering its securities. In the discipline of financial law, this is a typical requirement imposed on the issuer, particularly in cases where shares (equity securities by definition) are offered, so that an adequate illustration of the issuer's financial statements and future perspective of the market can be provided to the potential offeree.

For the purposes of integrity however, it must be acknowledged that the Prospectus Directive does contemplate within its provisions a range of offers that, albeit within the scope of that legislation, do not trigger any obligation of a prospectus (remarkably, in this respect, an offer of securities addressed to fewer than 150 natural or legal persons for each EU country where the offer takes place)⁴⁸ or are entirely exempt.⁴⁹ However, in the case under discussion, the offer of securities put forward by the employer would not simply to one employee shareholder but theoretically to the entire workforce⁵⁰ seem

⁴⁷ Among these details, some are certainly of 'corporate nature', such as those spelled out under section 205A(5) ERA 1996, particularly (c), (d), (e), (f), (g), (h), (i), (j). For example, emphasis can be placed on the 'statement' (section 205A(5)(f) ERA 1996) specifying whether 'the company has more than one class of shares (...)' or that (section 205A(5)(h) ERA 1996) relating to the circumstance that 'there are restrictions on the transferability of the employee shares and, if there are, what those restrictions are'. For an analysis of the Prospectus Directive from a British perspective, see A. Hudson, *Hudson The Law of Finance* (2nd edition, Sweet & Maxwell, 2013), p. 1055–1060. From a more international perspective, see P. Schammo, *EU Prospectus Law* (Cambridge University Press, 2010).

⁴⁸ More specifically, Article 3 of Directive 2003/71/EC mentions cases of *lack of applicability* of the 'obligation to publish a prospectus', in cases of 'an offer of securities addressed solely to qualified investors', 'an offer of securities addressed to fewer than 150 natural or legal persons per Member State, other than qualified investors', 'an offer of securities addressed to investors who acquire securities for a total consideration' of at least € 100,000 'per investor for each separate offer', 'an offer of securities whose denomination per unit amounts' to at least € 100,000, 'an offer of securities with a total consideration of less than' € 100,000 'which limit shall be calculated over a period of 12 months'.

It is worth noting that the Prospectus Directive has been partly amended by Directive 2010/73/EC amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, [2010] OJ L327/1.

⁴⁹ The exemption seems to be even more pertinent. Article 4 of Directive 2003/71/EC exempts from the obligation to publish a prospectus, among the others, for 'securities offered, allotted or to be allotted to existing or former directors or employees by their employer which has securities already admitted to trading or a regulated market or by an affiliated undertaking, provided that a document is made available containing information on the number and nature of the securities and the reasons for and details of the offer'.

⁵⁰ A workforce of more than 100 employees may not be uncommon in enterprises and businesses; therefore, an extensive offer of shares to employees for them to become shareholders is not a mere theoretical scenario.

consistent with the rule (and thus fall within the scope of the Prospectus Directive) rather than being an exception to it.

B. EMPLOYEE SHAREHOLDER AND THE 'CONSULTATION PROCESS'

To reinforce the criticism spelled out in the previous paragraph, it is worth noting that the British legislator, in introducing this new category, ought to have prescribed a consultation process with the trade unions in order to adequately communicate, in terms of consequences for the business and future prospects, a plan of 'multiple' offer to the workforce of employee shareholder 'statutes'.⁵¹ In this respect, the new British statute could also contravene the relevant EU directives (nonetheless implemented in the UK), namely the Directives on Collective Redundancies and Transfer of Undertakings⁵² and, even more blatantly, the Directive on Information and Consultation of Employees.⁵³ In a more practical scenario, the proposal of serial conversions of contracts of services in hybrid employee-shareholder relationships may camouflage systematic plans of redundancy or worse, orchestrated unfair dismissals of the workforce, with the trade unions being circumvented or entirely omitted from the process.⁵⁴

⁵¹ A different view is advocated by some scholars (M. Biasi, 'On Uses and Misuses of Worker Participation. Different Forms for Different Goals of Employee Involvement', 30 *International Journal of Comparative Labour Law & Industrial Relations* (2014); this author maintains that the employee shareholder could be in reality a British way to comply with the Directive on information and consultation. Although the employee shareholder is a concept that formally originates from the GIA Bill, it is not too speculative to cogitate on a subtle connection between this novel notion and the compensated no fault dismissal mentioned in the Beecroft Report (A. Beecroft, 'Report on Employment Law', *Department for Business, Innovation and Skills* (2012), <https://www.gov.uk/government/publications/employment-law-review-report-beecroft>).

⁵² Council Directive 77/187/EEC, revised by Directive 98/50/EC and subsequently consolidated in Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, [2001] OJ L 82/16. This EU statute has been transplanted in the UK within the latest Transfer of Undertakings (Protection of Employment) Regulations 2006. For a general consideration of the relevant discipline, see C. Barnard, *EU Employment Law*, p. 657–698.

⁵³ Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community, [2002] OJ L 80, or, more colloquially, 'Directive on National Information and Consultation', (C. Barnard, *EU Employment Law*, p. 685–691). This piece of legislation, which, as far as the UK is concerned, has been implemented by the Information and Consultation of Employees Regulations 2004, encourages workers and employers to strike deals on the kind of participation that the employees must be allowed in the work place. D. Cabrelli, *Employment Law in Context*, p. 777–816.

⁵⁴ The perplexities are not clarified by the firm and ostentatious statement of the British Government according to which the employee shareholder retains, among his rights, the collective redundancy consultation (see Department for Business, Innovation & Skills, 'Guidance Employee Shareholders', *Website of the UK Government* (2014), <https://www.gov.uk/employee-shareholders>). Doctrinally, this area 'of considerable uncertainty' has been emphasized by J. Prassl, 4 *ILJ* (2013), p. 318–319. Namely, this author correctly observes: 'Whilst the BIS Guidance lists Collective Redundancy consultation and TUPE, trade union rights as such appear to be excluded'.

§5. A COMPARATIVE ANALYSIS: ITALY AND ITS PARTICIPATION

From a comparative law perspective, forms of so-called cooperation between employers and employees already exist in other jurisdictions. Italy – a comparator for purposes of this analysis – already caters for a special category of ‘shares and financial instruments in favour of employees’.⁵⁵ The issue of securities of this typology requires an extraordinary shareholders’ meeting of the company so that ‘the distribution of profits to employees of companies or their subsidiaries’⁵⁶ can be resolved. The mechanism provided is the issue of a special category of shares to be assigned individually to employees, ‘for an amount corresponding to the said profits’.⁵⁷ Remarkably, the Italian Civil Code (ICC), in which the disposition at stake is enshrined, has been promulgated in an era (1942) where the statutory rights in favour of employees were far from being codified. Yet, the insertion, within the *corpus iuris* of the Italian company law, of the category of special shares for employees is not accompanied by any employee waiver of rights bestowed upon him. In other words, in Italy the participation of the employee has never been regarded as an alternative to the employee status (as the British legislator seems to have done more recently), but rather as cumulative.⁵⁸

In the same jurisdiction, from a mere labour law perspective, more recently and under the aegis of an Italian government,⁵⁹ the Italian Reform on Labour Market⁶⁰ has attempted to implement, in accordance with the Article 46 of the Italian Constitution,⁶¹ a form of co-participation of employees in the management of the company. However, apart from the legal technicality,⁶² the purposes and aims of this statute significantly

⁵⁵ Article 2349 of the ICC. See, among scholars, G. Zilio Grandi, ‘Art. 2349 ICC’, in R. De Luca Tamajo and O. Mazzotta (eds.), *Commentario Breve alle Leggi sul Lavoro* (CEDAM, 2013), p. 654.

⁵⁶ The same Article 2349 of the ICC.

⁵⁷ See specifically R. Caragnano, *Il Codice della Partecipazione* (Giuffrè Editore, 2010); R. Caragnano, ‘La Partecipazione dei Lavoratori: Prima Analisi delle Recenti Proposte di Legge’, *Working Papers Adapt* 86 (2009), www.bollettinoadapt.it/old/files/document/4576WP_09_86.pdf.

More generally, A. Vallebona, *Breviario di Diritto del Lavoro* (8th edition, Giappichelli Editore, 2013), p. 314, 315; M. Persiani et al., *Fondamenti di Diritto del Lavoro* (CEDAM, 2013), p. 132–133.

⁵⁸ As the concept merely relates to the remuneration, the shareholder employee will be able to take part in the scheme by receiving part of his wage through the profit. See F. Carinci et al. (eds.), *Diritto del Lavoro*, 2. *Il Lavoro Subordinato* (Giuffrè Editore, 2011), p. 268.

⁵⁹ Clearly, reference is made to the ‘bureaucratic’ Monti Cabinet, in charge of the stewardship of that country from 16 November 2011 until 28 April 2013.

⁶⁰ Law no 92 of 28 June 2012 (the Fornero Act).

⁶¹ Namely: ‘For purposes of bettering off labour both economically and socially and coherently with the industrial needs, the Republic [of Italy] acknowledges the rights of workers to cooperate, within the forms and limitations set forth under statute, in the management of companies’ (our translation).

See M. Papaleoni, ‘Art. 46 Cost.’, in R. De Luca Tamajo and O. Mazzotta (eds.), *Commentario Breve alle Leggi sul Lavoro* (CEDAM, 2013), p. 121.

⁶² In a country such as Italy whether the contractual agreement is endowed with quasi-legislative effects, the implementation of the new provisions shall occur through collective agreements at plant level. M. Biasi, 30 *International Journal of Comparative Labour Law & Industrial Relations* (2014).

differ from those permeating the British legislation and, specifically, the GIA 2013. More specifically, on the one hand, no employee has been deprived of any right, particularly the right not to be unfairly dismissed; on the other hand, the implementation of the relevant benefits has been envisaged through delegated legislation (by government decree).

More generally, it is worth noting that the different forms of involvement of employees contemplated under Article 4(62) of the Fornero Act⁶³ refer, among the others, to information and consultation duties in favour of employees or their representatives (Article 4(62)(a) of the Fornero Act) and, particularly, the appointment of employee representatives in the supervisory boards of companies employing more than 300 people (Article 4(62)(f) of the Fornero Act).⁶⁴

Ultimately, the recent 'Italian job' seems to be more consistent and rational than the nearly contemporaneous British counterpart, as it does not 'mess up' the variety of rights bestowed at statutory level upon employees. Additionally, it seems to be more consistent with the ostensive purpose of the supporting legislation, as it does not simply arrange for a financial participation (the shares) but also for an active management involvement of the employees (the employees being duly represented in the management structure of the employer).

§6. CONCLUSION

At European Union level, there is an increasing movement towards the creation of frameworks of 'workers participation'. The British 'employee shareholder', far from being the answer to that question, may be in reality a peculiar attempt from across the Channel to erase the employee from the workplace. It is apparent and incontrovertible that the legislation on the employee shareholder in Britain signals the end of the values that have been permeating the contract of service since as early as the 1960s: the power of the employer compensated by the guarantee of the basic protections of the employee.⁶⁵ The former still remains, as a result of the latest legislative developments; conversely, the latter slowly but inexorably fades away, and the employee loses the public regulatory benefits of the contract of service. It is arduous not to imagine that the case law shall remain insensitive to these changes when required to investigate on the implied duties that shall be applied to the employee shareholder.

The contribution has referred to the possible flaws connected with the way the new category has made its debut in Britain, as well as the apparent inconsistencies with pieces of legislation of cognate areas of law, at both national and supranational level (in this

⁶³ Law No. 92 of 28 June 2012.

⁶⁴ For a commentary to the Italian Law No. 92/2012, M. Biasi, 30 *International Journal of Comparative Labour Law & Industrial Relations* (2014).

⁶⁵ A. Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford University Press, 2001), p. 10.

respect, the brief comparison with Italy in this contribution is telling). Additionally, the paper has hinted at the potential conundrum that the common law will seemingly face in future, in dealing with the traditional duties implied to the contract of service and, more specifically, if and how they will continue to apply to the employee shareholder.

Ultimately, this article raises the concern that, with the entitlement recently bestowed on the employer to demand that the employee becomes an 'employee shareholder' and the resulting loss of the prerogatives of the employee main rights (for example not to be unfairly dismissed), acceptance by the employee would render the contract of service in Britain a residual contractual relationship, rather than the centre of the employer-employee relationship. In the same fashion, the word 'employee', if construed within this new scenario and if such a trend was consolidated, will progressively lose its evocative substance: the status, and will revert to its origins, the employee as a mere party to a personal work relationship, with limited or non-existent protection of a legislative nature.